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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE, Plaintiff and Respondent, v. KEVIN DASHAWNE CARLOCK, Defendant and Appellant.	C085983 (Super. Ct. No. 15-CR-23621-02)

A jury found defendant Kevin Dashawne Carlock guilty of conspiracy to commit a home invasion robbery, acquitted him of assault with a semiautomatic firearm, and could not reach a verdict on numerous other charges, including two counts of attempted home invasion robbery.

On appeal, defendant contends (1) the trial court erred in failing to instruct the jury that it had to unanimously decide which overt act it found true, and in failing to instruct the jury that defendant could avoid liability for the conspiracy by withdrawing from it;

and (2) there is insufficient evidence to support the conspiracy conviction, or even to determine whether the conviction is based on sufficient evidence. In supplemental briefing, defendant contends in light of Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1, 2) (Senate Bill 1393) his case must be remanded to allow the trial court to exercise its discretion to strike his five-year prior serious felony enhancement.

Except to remand for resentencing under Senate Bill 1393 (2017-2018 Reg. Sess.), we disagree with defendant's contentions and affirm the judgment.

BACKGROUND

While working as an escort, Lucia Magana-Verduzco met victim Philip K. Over the course of a few nights they spent time together partying and having sex, Magana-Verduzco saw Philip had a large quantity of marijuana in his motorhome at an RV Park in Plymouth, California. In fact, Philip and his friend, Lance C., had come to California from Ohio to process marijuana and transport it back to Ohio. Magana-Verduzco told her boyfriend, William Johnson, about the marijuana in the motorhome, and later took pictures and videos of it. Johnson showed defendant and others the videos and pictures.

Magana-Verduzco, Johnson, and Johnson's uncle, the defendant here, made a plan to steal the marijuana from Philip. They worked out the details of the plan, including how many people, cars, and guns were necessary, and how the plan would be carried out. The substance of the plan was they would go to the motorhome, Magana-Verduzco would follow her usual pattern with Philip, and when they were done, she would ask him to walk her to her car. The others would then rush into the motorhome and take the marijuana. They temporarily halted the plan when they thought Philip would be out of town on the night they planned to commit the robbery. But, Philip later told Magana-Verduzco that he was still in Plymouth, so they decided to go forward with the robbery.

Defendant's car was too conspicuous to use in the robbery, so they decided to rent a vehicle. Magana-Verduzco, Johnson, and defendant drove to defendant's bank.

Magana-Verduzco and Johnson deposited money in defendant's account to use to rent the car. The trio then drove to the airport and defendant rented a dark-colored Mazda.

Defendant drove the rental car to Magana-Verduzco's house. She and Johnson then went to purchase supplies for the robbery, including a hoodie and mask. Magana-Verduzco drove her Mercedes to the RV park in Plymouth to meet Philip. An hour or two after Magana-Verduzco arrived at the RV park, two other vehicles entered the park, a white sedan and a dark-colored sedan. Four minutes later, all three vehicles left the RV park.

When Magana-Verduzco arrived at Philip's, she went inside and spent time with him. When they were done, and after she heard a car driving on the gravel outside, she asked Philip to walk her to her car. As they stepped outside, a number of men in masks and hooded sweatshirts jumped Philip. Philip got away and yelled for Lance, who was in the motorhome. Philip then saw one of the men go into the motorhome. In the ensuing struggle between the men, Philip sustained a laceration to his head and ear and a broken finger, and Lance sustained a gunshot wound to his cheek and a bullet lodged in his head.

When responding to the scene, Deputy John Foosum saw three vehicles, including a Mercedes, leaving the area at a high rate of speed. Law enforcement officers stopped Magana-Verduzco in her Mercedes and arrested her.

Defendant denied participating in the robbery or knowing about it ahead of time. He claimed he learned of it the following morning on the news. He also denied owning a handgun of the same caliber as one used in the robbery and, in fact, denied ever owning any type of firearm. He acknowledged Magana-Verduzco and Johnson had given him a ride to the bank to deposit money so he could rent a car, and then drove him to rent the car. He claimed he rented the car because his car was unreliable. Later, he went to Johnson's home to give him money for the ride to the airport. While waiting for Johnson to arrive, he got involved in a game of dominoes. He eventually gave Magana-Verduzco

the keys to the rental car so she could get Johnson. She did not return with the car, so he got a ride home with one of the people with whom he was playing dominoes.

The jury found defendant guilty of conspiracy to commit a home invasion robbery (Pen. Code, § 182, subd. (a)(1))[1] and not guilty of assault with a semiautomatic firearm (§ 245, subd. (b)). The jury could not reach verdicts on the remaining counts, including two counts of attempted home invasion robbery. (§§ 664/211, 212.5 & 213, subd. (a).) The trial court declared a mistrial as to those counts. In bifurcated proceedings, the trial court found true four prior strike allegations (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), one prior serious felony (§ 667, subd. (a)(1)), and one prior prison term allegation (§ 667.5, subd. (b)). The trial court sentenced defendant to an aggregate term of 27 years to life, plus a five-year enhancement for the prior serious felony under section 667, subdivision (a)(1), and a one-year enhancement for the prior prison term under section 667.5, subdivision (b).

DISCUSSION

I

The Law of Conspiracy

A criminal conspiracy exists when two or more people agree or conspire to commit a crime, with the specific intent to agree and to commit the crime, and an overt act by one or more of the parties to the agreement in furtherance of the agreement. (*People v. Johnson* (2013) 57 Cal.4th 250, 257; § 182, subd. (a).) "Evidence of an agreement does not require proof that the parties met and expressly agreed; a criminal conspiracy can be shown through circumstantial evidence. [Citation.]" (*People v. Penunuri* (2018) 5 Cal.5th 126, 145.) " ' "The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before

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[1] Undesignated statutory references are to the Penal Code.

and during the alleged conspiracy." ' [Citation.]" (*Ibid*.) In addition, "[t]he existence of a conspiracy may be proved by uncorroborated accomplice testimony; corroboration of accomplice testimony is needed only to connect the defendant to the conspiracy." (*People v. Price* (1991) 1 Cal.4th 324, 444.)

The criminal act is the agreement, but that act is not itself punishable absent some overt act committed in furtherance of the conspiracy by any one of the conspirators. (§§ 182, subd. (b), 184; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1708.) Once that overt act has been committed, the crime of conspiracy is complete. (*People v. Johnson*, *supra*, 57 Cal.4th at p. 259; *People v. Sconce* (1991) 228 Cal.App.3d 693, 702 (*Sconce*).) The overt act need not be committed by the defendant, and it need not be a criminal offense. (*People v. Robinson* (1954) 43 Cal.2d 132, 139 ["The overt acts need not be in themselves criminal in nature so long as they are done in pursuance of the conspiracy"].) The prosecution must prove the commission of an overt act, but "the jury need not agree on a specific overt act as long as it unanimously finds beyond a reasonable doubt that some conspirator committed an overt act in furtherance of the conspiracy." (*People v. Russo* (2001) 25 Cal.4th 1124, 1128 (*Russo*).) "Disagreement as to who the coconspirators were or who did an overt act, or exactly what that act was, does not invalidate a conspiracy conviction, as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance of the conspiracy." (*Id.* at p. 1135.)

Withdrawal from a conspiracy is a complete defense only if it is done before the commission of an overt act.[2] (*Sconce*, *supra*, 228 Cal.App.3d at p. 701.) Withdrawal

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[2] "Withdrawal from a conspiracy requires 'an affirmative and bona fide rejection or repudiation of the conspiracy, communicated to the coconspirators. [Citations.]' [Citation.]" (*Sconce*, *supra*, 228 Cal.App.3d at p. 701, quoting *People v. Crosby* (1962) 58 Cal.2d 713, 730-731.) " 'Generally, a defendant's mere failure to continue previously

does not relate back to the formation of the conspiracy or undo liability for the completed crime of conspiracy; rather, "withdrawal merely precludes liability for subsequent acts committed by the members of the conspiracy." (*Id.* at p. 702.)

II

Instructional Error

Defendant contends the trial court erred in failing to give a unanimity instruction on the overt acts of the conspiracy. Defendant acknowledges that the law does not require a unanimity instruction as to overt acts in a conspiracy, but claims nonetheless that a "confluence of four separate principles of law" applicable in this case creates "unique circumstances" which warrant a departure from the established case law. He also contends the verdict reflects "considerable confusion" in that the jury found defendant guilty of conspiracy but not guilty of assault with a semiautomatic firearm. Under the same heading, defendant also contends that the trial court erred in denying his request to give an instruction on withdrawal from the conspiracy. He argues such an instruction would have permitted the jury to find him not guilty of conspiracy, because "liability for conspiracy 'is avoidable by disavowing or abandoning the conspiracy.' "

A. *Forfeiture*

Without addressing whether the claimed error affects defendant's substantial rights, the People claim the instructional error was forfeited by the failure of trial counsel to object. (§ 1259; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249 ["Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was"].) We disagree.

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active participation in a conspiracy is not enough to constitute withdrawal.' " (*People v. Lowery* (1988) 200 Cal.App.3d 1207, 1220.)

When supported by substantial record evidence, the unanimity and withdrawal instructions are ones that a trial court must give sua sponte. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 569; *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 647; *People v. Fiu* (2008) 165 Cal.App.4th 360, 382-386.) When a claim of instructional error relates to matters on which the trial court has a sua sponte duty to instruct, defendant is not required to object or request the instruction to preserve the claim for appeal. (*People v. Valdez* (2012) 55 Cal.4th 82, 151, citing *People v. Rogers* (2006) 39 Cal.4th 826, 850, fn. 7; *People v. Ngo* (2014) 225 Cal.App.4th 126, 157, fn. 19.) Accordingly, it is appropriate to address the merits of defendant's claims. (*Valdez, supra,* at p. 151.)

B. *Unanimity*

Defendant argues the guilty verdict "may only stand if a jury finds at least one overt act performed in furtherance of a conspiracy supported by independent evidence that links a defendant to the crime, and the finding survives the crucible of appellate review for sufficiency of the evidence." He contends that as only four of the 20 alleged overt acts are established by evidence independent of accomplice testimony and implicate defendant, and the jury was not given a unanimity instruction, this verdict must be set aside. Specifically, he claims the instructions "given do not permit independent review of the sufficiency of the evidence because it is unknown what overt act or acts the jury found true."

This case is not as complicated, confusing, or novel as defendant asserts. And there is ample authority rejecting the contention that the jury must unanimously agree upon, or identify, specific overt acts in order to find a defendant guilty under a conspiracy theory. (*People v. Prieto* (2003) 30 Cal.4th 226, 251; *Russo, supra,* 25 Cal.4th at p. 1135.) *Russo* and *Prieto* are binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In addition, as discussed *post*, there is sufficient evidence to support the conviction.

C. *Withdrawal*

Defendant argues that finding him guilty of conspiracy, not guilty of assaulting Lance with a semiautomatic firearm, and failing to reach verdicts on the attempted home invasion charges resulted in inconsistent verdicts, "assuming [defendant] was one of the robbers." He contends the only way to reconcile these verdicts with the instructions given is if the jury found defendant participated in the conspiracy by renting the car, then disavowed the conspiracy and withdrew after giving Magana-Verduzco the rental car keys. He argues the fact that the jury was not given a withdrawal instruction precluded the jury from finding him not guilty of conspiracy.[3] This argument misstates the law governing withdrawal from a conspiracy.

The trial court has a sua sponte duty to instruct on defenses " 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 157, original italics, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 716.) As the trial court found here, defendant did not claim he withdrew from the conspiracy; indeed, such a claim was inconsistent with his theory of the case. Defendant maintained that he did not participate in the conspiracy *at all*, and knew nothing about the robbery until he saw a news report the following day. Accordingly, the trial court did not err in refusing to instruct the jury on withdrawal from a conspiracy.

Further, contrary to defendant's claim, even if the trial court had given such an instruction, it would not have relieved defendant of liability for conspiracy. If the jury found defendant withdrew from the conspiracy by giving Magana-Verduzco the keys to

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[3] Although the trial court did not give an instruction on withdrawal from conspiracy, it did instruct the jury: "A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed." (CALCRIM No. 401, as given.)

the rental car and not participating further, this could relieve him of liability for acts committed only *after* the alleged withdrawal. He would continue to be liable for the conspiracy itself, which was complete upon agreement and the commission of, among other overt acts, defendant renting the car. Under the circumstances, an instruction on withdrawal would not have given the jury a means to acquit defendant of conspiracy.

III

Substantial Evidence

Defendant claims there was insufficient evidence to support the conspiracy conviction because of inconsistent verdicts; or alternatively, that the conviction must be reversed because it is not even possible to determine whether the conviction was based on sufficient evidence. We disagree.

A. *Inconsistent Verdicts*

Defendant's argument is not a standard substantial evidence argument, but rather a claim that in the specific context of a conspiracy case, there is a limited judicial exception to the rule against attacking inconsistent verdicts. To the extent this limited exception remains viable at all (see *People v. Palmer* (2001) 24 Cal.4th 856, 860-865), it applies only in cases in which the overt act alleged in the "conspiracy charge is identical to another charged offense of which defendant is acquitted." (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1658; *In re Johnston* (1935) 3 Cal.2d 32, 34-36; *People v. Eberhardt* (1985) 169 Cal.App.3d 292, 297.) However, "where there are overt acts alleged in the conspiracy count other than or in addition to the act constituting the substantive offense charged against a defendant in another count, there is no inconsistency in convicting that defendant of conspiracy but acquitting him of the substantive offense." (*Eberhardt, supra,* at p. 297; *People v. Robinson, supra,* 43 Cal.2d at p. 138.)

As he argued with respect to the claimed instructional errors, defendant contends the verdicts finding him guilty of conspiracy, not guilty of assaulting Lance with a firearm, and reaching no verdict on attempted home invasion are inconsistent. Defendant

is incorrect. There were a number of overt acts alleged other than the acts comprising the substantive offenses of assault with a firearm or attempted home invasion, most notably, the overt act of defendant renting the car. As the authorities hold, there is nothing inconsistent in the jury finding (1) that defendant agreed with Magana-Verduzco and Johnson to commit the robbery, and (2) that defendant (or one of his coconspirators) committed overt acts in furtherance of the agreement, thereby making him guilty of the conspiracy.[4]

B. *Substantial Evidence*

In reviewing the sufficiency of the evidence, " 'we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' [Citation.]" (*Cravens*, 53 Cal.4th at p. 508.) The standard of review is the same in cases in which a conviction is based primarily on circumstantial evidence. (*People v. Clark* (2016) 63 Cal.4th 522, 625.)

The accomplice testimony of Magana-Verduzco and Johnson that, over the course of a few evenings, defendant planned the robbery of Philip with them, these planning sessions included details about how many people were necessary, how many cars they

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[4] Again, had there been evidence that defendant withdrew from any further participation in the conspiracy, this would only have relieved him of liability for crimes committed after withdrawal.

should take, how many guns were necessary, and who had those guns, sufficiently established the existence of a conspiracy. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1134-1135 ["the independent proof required to establish the existence of a conspiracy may consist of uncorroborated accomplice testimony"].) Defendant's relationship with his nephew, Johnson; his going with Johnson and Magana-Verduzco to his bank and their depositing money in the bank for him; him renting a car with that money; and, his giving Magana-Verduzco the keys to that car, provided further independent circumstantial evidence of the conspiracy. Defendant's overt acts of going to the bank and renting the car were sufficient corroborating evidence to connect defendant to the conspiracy. Accordingly, there is substantial evidence supporting defendant's conspiracy conviction.

IV

In supplemental briefing, defendant contends he is entitled to remand to allow the trial court to exercise discretion newly granted it by Senate Bill 1393 (2017-2018 Reg. Sess.) to strike the serious felony prior used to support the five-year enhancement under section 667, subdivision (a)(1). Before Senate Bill 1393's adoption, the law prohibited courts from striking felony priors used for purposes of the section 667 enhancement. (Former § 1385, subd. (b).) Senate Bill 1393, effective January 1, 2019, lifted that prohibition. In a supplemental brief, defendant contends Senate Bill 1393 is retroactive and applies to his case, which was not final as of its effective date. The Attorney General did not file an opposition on this point. We agree with defendant.

Absent evidence to the contrary, amendments to statutes that reduce the punishment for a crime or vest in trial courts the discretion to impose a lesser penalty, such as Senate Bill 1393, apply to all defendants whose judgments are not final as of the amendment's effective date. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745; *People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973.) When it enacted Senate Bill 1393, the Legislature did not indicate it intended the legislation to apply prospectively only. (*Garcia, supra,* at p. 972.) Thus, the act applies retroactively to this case.

We are required to remand in instances such as this "unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] enhancement" even if it had the discretion. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) The record here contains no such evidence. We remand for the trial court to consider striking the serious felony prior that supports the enhancement imposed under section 667, subdivision (a)(1).

DISPOSITION

The matter is remanded for the limited purpose of allowing the sentencing court to exercise its discretion authorized by Senate Bill 1393. The judgment is otherwise affirmed.

KRAUSE, J.

We concur:

HULL, Acting P. J.

BUTZ, J.